Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 98-147
Deployment of Wireline Services Offering	)	
Advanced Telecommunications Capability	)	

COMMENTS OF CABLEVISION LIGHTPATH, INC.

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Cablevision Lightpath, Inc. ("CLI" or "Lightpath"), by its attorneys, submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") regarding the provision of advanced services by wireline carriers.[1/]

INTRODUCTION AND SUMMARY

CLI is a facilities-based competitive local exchange carrier ("CLEC") providing an array of basic and advanced telecommunications services in certain states, including New York and Connecticut. As a CLEC competing against incumbent local exchange carriers ("ILECs" or "incumbent LECs") to provide such services, CLI has a vested interest in ensuring that CLECs are afforded a level playing field in the advanced services market. In this regard, CLI generally supports the pro-competitive proposals set forth by the Association for Local Telecommunications Services ("ALTS") on behalf of all facilities-based providers.[2/]

1/ In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188 (rel. Aug. 7, 1998) ("Order" or "NPRM").

2/ Petition of the Association for Local Telecommunications Services for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced

These comments focus on two areas of particular concern to Lightpath. First, Lightpath is gravely concerned about the anti-competitive effect of the Bell companies' most recent attempt to circumvent the section 271 interLATA services restriction. The Commission has already properly ruled that it does not have authority to forbear from enforcing the interLATA services restriction pursuant to section 706 of the Telecommunications Act of 1996.[3/] Undeterred, the Bell companies are now requesting that the Commission grant them "targeted" interLATA relief to provide advanced services in certain remote areas and that the Commission do so by exercising its authority to modify LATA boundaries.

The interLATA relief the Bell companies are requesting, however, cannot be characterized as an exercise of LATA boundary modification authority. Consequently, the Commission does not have authority to grant this form of relief. Moreover, granting such relief would undermine the primary policy goal of the interLATA services restriction: to preserve the Bell companies' full incentive to open their local markets to competition and thus to ensure the development of new and innovative services for consumers.

Second, Lightpath is concerned that CLECs may not be provided nondiscriminatory access to xDSL-capable loops. In this regard, the Commission should confirm its tentative conclusions that it is preemptively technically feasible for ILECs to provide xDSL-capable loops (and that the burden is on the ILEC to rebut the presumption). Along the same lines, the

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Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-78 (filed May 27, 1998).

3/ Order at ¶ 69.

Commission should also establish a corollary rule that ILECs cannot demand that CLECs submit a Bona Fide Request ("BFR") as a prerequisite to obtaining xDSL.

Finally, Lightpath urges the Commission to carefully consider the potentially anti-competitive ramifications of its separate subsidiary proposal before taking any action. Today, ILECs that are deploying xDSL transmission technologies are still using their existing circuit-switched networks for basic voice services; however, it may not be long before technology develops to the point where it is feasible for ILECs gradually to move basic voice services to their packet-switched networks. When that point arrives, there will be a host of unresolved, vexing issues confronting the Commission, especially with respect those customers and competitors who will continue to need to rely on the existing ILEC circuit-switched network. Moreover, without significant safeguards in place, the potential exists for ILECs to slide core monopoly services in unregulated xDSL subsidiaries, thereby violating the pro-competitive policies of the 1996 Act. Therefore, at a minimum, any decision concerning the Commission's separate subsidiary proposal should be carefully crafted to avoid these potential pitfalls.

DISCUSSION

I. THE COMMISSION DOES NOT HAVE AUTHORITY TO GRANT THE BELL COMPANIES REQUEST FOR "TARGETED" INTERLATA RELIEF

As the Bell companies properly observe, section 3(25)(B) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, effectively authorizes the Commission to modify LATA boundaries.[4/] Specifically, section 3(25) defines a "local access and transport area" or LATA as "a contiguous geographic area" established before the 1996 Act

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4/ See 47 U.S.C. § 153(25).

or "established or modified by a Bell operating company . . . and approved by the Commission."[5/] This wording implies that the Commission has some authority to grant Bell company requests to modify LATA boundaries.

The fatal flaw in the Bell companies' position, however, is that the "targeted" interLATA relief they seek for advanced services in certain remote areas cannot plausibly be characterized as an exercise of this LATA boundary modification authority. As the statutory definition of LATA dictates, a LATA modification is a modification of a particular "geographic area" with a border that demarcates that area from adjacent areas.[6/] Thus, the modification of a particular LATA necessarily involves the moving of that LATA's border from one geographical location to another, such that some traffic that was interLATA becomes intraLATA and some traffic that was intraLATA becomes interLATA.

What the Bell companies are seeking simply does not fit this description of a LATA boundary modification. Specifically, what the Bell companies want is to transport, in certain remote areas, a particular kind of traffic – namely, advanced services traffic – from an existing LATA, over an existing LATA boundary, and into another LATA, or back again – and they think they can do so by having LATA boundaries "modified." By virtue of such "modification," however, no advanced services traffic that was formerly intraLATA would become interLATA (and thereby impermissible). And certainly for all other kinds of traffic, the existing LATA boundary would remain in place. In sum, what the Bell companies are seeking does not in any way involve the moving of a geographic border from one location to another and cannot be

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5/ See 47 U.S.C. § 153(25)(B).

6/ See 47 U.S.C. § 153(25).

coherently characterized as a LATA boundary modification. Rather, what the Bell companies are really seeking is an outright waiver of the interLATA services restriction, for purposes of carrying advanced services traffic in certain remote areas.

Perhaps the best evidence that the characterization of the Bell companies' request as a LATA boundary "modification" cannot be sustained is that, during the years (before 1996) that the interLATA services restriction was governed by the AT&T consent decree, the Bell companies filed similar "targeted" requests for interLATA relief and did not themselves characterize such requests as boundary modifications. The Bell companies styled their requests as waivers, and that is how the decree court handled them.[7/] Of course, there is an obvious reason why the Bell companies no longer adhere to the characterization of their "targeted" requests for interLATA relief as waivers: Congress chose not to vest interLATA waiver authority in the Commission when it enacted section 271.

Section 271 of the Telecommunications Act sets out a specific set of stringent requirements that the Bell companies must meet before the Commission can lift the (in-region) interLATA services restriction – requirements such as a 14 point checklist designed to ensure that the Bell companies have truly opened their local markets to competition.[8/] Perhaps because Congress knew there would be great pressure on the Commission to lift the interLATA services prematurely, before markets were truly opened, it chose not to give the Commission any general

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7/ See, e.g., United States v. Western Elec. Co., No. 82-0192, slip op. at 13 (D.D.C. Apr. 28, 1995); see also United States v. Western Elec. Co., No. 82-0192, slip. op. at 3 (D.D.C. Feb. 16, 1989), citing United States v. Western Elec. Co., No. 82-0192 (D.D.C. June 16, 1988) and United States v. Western Elec. Co., No. 82-0192 (D.D.C. Sept. 22, 1987); United States v. Western Elec. Co., 578 F.Supp. 643, 647-48 (D.D.C. Nov. 1, 1983).

8/ See 47 U.S.C. § 271(c)(2)(B).

waiver authority of the kind that existed under the AT&T consent decree. Indeed, as the Commission recognized in its NPRM,[9/] when Congress drafted section 10 of the 1996 Act – a provision granting the Commission sweeping discretionary forbearance authority – it specially excepted the section 271 interLATA services restriction from that forbearance authority.[10/]

Rather than grant the Commission general discretionary waiver authority, Congress chose instead to enumerate a list of specific statutory exceptions to the section 271 interLATA services restriction, set forth in section 271(g) and referred to as "incidental" (in-region) interLATA services.[11/] For example, section 271(g) indicates that the Bell companies may provide (in-region) interLATA Internet services to schools.[12/] Moreover, section 271 explains that these statutory exceptions "are to be narrowly construed."[13/] The upshot is: because the services the Bell companies seek to provide here – advanced interLATA services in certain remote areas – are not among the specific exceptions enumerated in section 271(g), the Bell companies may not provide them, and the Commission has no general waiver authority to rule otherwise.[14/]

9/ NPRM at ¶¶ 72-77.

10/ 47 U.S.C § 160(d) ("Section 10(d)").

11/ Id. at § 271(g).

12/ Id. at § 271(g)(2).

13/ Id. at § 271(h). The statue also instructs the Commission to "ensure that the provision of services authorized under [section 271](g) by a Bell operating company or its affiliate will not adversely affect . . . competition in any telecommunications market." Id.

14/ The Bell companies rely heavily on the Commission's recent expanded calling area decisions, in which the Commission invokes its LATA boundary modification authority. See In the Matter of Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations, CC Docket No. 96-159, Memorandum Opinion and Order, 12 FCC Rcd 10646 (1997) (ELCS MO&O) (granting 23 out of 24 requests for boundary modifications to permit calls within certain extended local calling service areas to

There is a sound policy reason for why Congress would not have wanted the Bell companies to be able to dismantle the interLATA services restriction in a piecemeal fashion. Even with the full incentive of section 271 in place, the Bell companies have been slow to do the work necessary to open up their networks to competition. Allowing the BOCs to transport advanced services traffic across LATA boundaries before they have met their obligations under section 271, even in selected areas, will only serve to diminish their incentive to open their local networks, thereby slowing the development of local competition. Finally, as AT&T and others have argued, the Bell Companies greatly exaggerate the impact that the lack of interLATA authority has on the provision of advanced services in remote areas.

If the BOCs truly want to enter the in-region, interLATA data services market, they must comply with the requirements of section 271. Instead of devoting their resources and energy to satisfying the 271 requirements, however, the Bell companies continue to devise back-door regulatory efforts and to use court litigation in an effort to avoid their obligations under section 271.[15/] The Commission should not reward these tactics. The Commission should instead

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be treated as intraLATA). To the extent that what the Commission effectively did was waive a LATA boundary as opposed to modify a LATA boundary, these decisions share the same questionable jurisdictional basis. In any event, Lightpath did not participate in the proceedings which generated these decisions on the grounds that, in its view, any anti-competitive effects are de minimis.

15/ The BOCs have also sought to avoid these obligations through challenges to various aspects of the Telecommunications Act of 1996 and the Commission's implementation of that statute. See, e.g., Bell Atlantic Tel. Cos. v. Fed. Communications Comm'n, No. 97-1432 (D.C. Cir. Dec. 23, 1997) (challenging the FCC's interpretation of section 272); Iowa Utils. Bd. v. Fed. Communications Comm'n, 120 F.3d 753 (8th Cir. 1997), cert. granted, 118 S. Ct. 879 (1998) (challenging the FCC's pricing rules); SBC Communications Inc. v. Fed. Communications Comm'n, No. 7:97-CV-163-X (N.D. Tex. Dec. 31, 1997), appeal docketed, No. 98-10140 (5th Cir. Feb. 5, 1998) (challenging the constitutionality of section 271); SBC Communications Inc.

reconsider any tentative conclusion to the contrary and categorically reject the Bell companies' request for "targeted" interLATA relief.

II. ILECs MUST PROVIDE CLECs WITH NONDISCRIMINATORY ACCESS TO UNBUNDLED xDSL COMPATIBLE LOOPS

While the Commission's Order concerning the Bell Companies' Section 706 petitions addresses many CLEC concerns about access to xDSL-capable loops, there is still more that the Commission can do to strengthen the ability of new entrants to gain access to xDSL-compatible loops on a nondiscriminatory basis.[16/] In its Order, the FCC issued a declaratory ruling requiring ILECs to provide CLECs with nondiscriminatory access to unbundled loops capable of transporting high-speed digital signals, including xDSL, where technically feasible.[17/] The Commission's NPRM, however, requests comment on its tentative conclusions that (1) providing an xDSL-compatible loop as an unbundled network element is presumed to be technically feasible if the ILEC is capable of providing xDSL-based services over that loop;[18/] and that (2) the ILEC bears the burden of demonstrating that it is not technically feasible to provide

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v. Fed. Communications Comm'n, No. 97-1425 (D.C. Cir. March 20, 1998) (challenging the FCC's denial of section 271 application to provide interLATA service in Oklahoma).

16/ This section responds to the Commission's request for comments in ¶¶ 151 and 168 of the NPRM.

17/ See Order at ¶ 52; NPRM at ¶ 167. This requirement exists regardless whether the ILEC itself offers, or uses, xDSL services. See Order at ¶ 37. As the Commission explained in its Local Competition Order, "section 251(c)(3) does not limit the types of telecommunications services that competitors may provide over unbundled elements to those offered by the incumbent LEC." Local Competition Order at 15691-92, ¶ 381; see also NPRM at ¶ 152.

18/ NPRM at ¶ 167. The Commission also required ILECs to "take affirmative steps to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities." Local Competition Order at 15692, ¶ 382.; NPRM at ¶ 152.

requesting carriers with xDSL-compatible loops.[19/] The Commission should solidify these tentative conclusions by issuing an order making it clear that an ILEC must provide xDSL-capable loops on an unbundled basis unless the ILEC can demonstrate that it is not technically feasible to do so.

It is vital that the ILEC carry the burden on feasibility. A finding otherwise will require CLECs to bear substantial costs and incur needless delay to obtain DSL compatible loops. Today, in most instances, ILECs require CLECs to go through a lengthy and expensive Bona Fide Request ("BFR") process for any network element not specifically identified in the CLECs interconnection agreement with the ILEC. Allowing ILECs to require BFRs would hamper CLECs' ability to gain access to xDSL elements, cause unnecessary delays and deter competition in the advanced services market.

The slow and unwieldy nature of the BFR process is exemplified by the BFR requirements contained in CLI's interconnection agreement with Bell Atlantic in Massachusetts.[20/] The BA-MA Agreement requires CLI to submit a BFR in writing and include a technical description of the element requested.[21/] Bell Atlantic ("BA") then has ten business days to acknowledge receipt of the BFR,[22/] and 30 additional days to provide a preliminary analysis of CLI's request.[23/]

19/ NPRM at ¶ 167.

20/ See "Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 by and Between New England Telephone and Telegraph Company and Cablevision Lightpath - MA, Inc.," dated as of Aug. 25, 1998 (available from the Massachusetts Department of Telecommunications and Energy) ("BA-MA Agreement").

21/ BA-MA Agreement, Exhibit B, ¶ 2.

22/ Id. at ¶ 4.

In its preliminary analysis, BA must either confirm that it will offer access to the requested element(s), or explain that such access is either not technically feasible and/or that BA is not required to provide the element(s) under the 1996 Act.[24/] BA then has up to ninety days to provide CLI with a quote describing the element, its availability and the applicable rates.[25/] Thus, CLI may have to wait up to 130 days from the time it submits a BFR to find out whether Bell Atlantic will offer the requested element at acceptable rates, terms and conditions. Moreover, there is no provision requiring Bell Atlantic to actually provide the requested element within a specified time period.[26/] The 130 days is therefore effectively the minimum amount of time CLI can expect to wait between the time it requests an element and the time it receives access to that element. As if that delay were not impediment enough, CLI must also incur the cost of preparing the BFR and the accompanying technical description. This process is inefficient and anticompetitive, in that it causes delays in the deployment of services and increases CLI's costs to serve its customers.

The Commission should prevent such delays by adopting its tentative conclusions that xDSL is presumed to be technically feasible, and that the ILECs bear the burden of refuting that presumption. The Commission should also make clear that because ILECs bear the burden of showing that it is not technically feasible to provide access to xDSL-capable loops, there is no

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23/ Id.

24/ Id. at ¶ 5.

25/ Id. at ¶ 8.

26/ Despite all deliberative attempts by CLI to ensure that its interconnection agreement with BA was tailored in an even-handed fashion, certain provisions were nonetheless impacted by the unequal bargaining power accorded ILECs and CLECs under such circumstances.

need for CLECs to submit a BFR. The Commission should make this explicit by ordering that an ILEC cannot require a CLEC to submit a BFR as a prerequisite to obtaining access to xDSL elements. Otherwise, the deployment of advanced services will be delayed and competition will suffer.

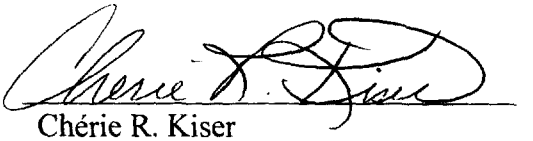
CONCLUSION

In its NRPM, the Commission has sought to strike a proper balance between competing regulatory considerations: a desire to promote the deployment of advanced services and the preservation of all necessary safeguards and incentives needed to promote robust competition. While a strong argument can be made that no additional incentives are needed to encourage ILECs to deploy high-speed services, it cannot be said that all of the safeguards needed to promote full and fair competition are in place. It is essential that the Commission be judicious in creating any ILEC incentives and focus on striking a proper balance between incumbent and competitor positions so that the pro-competitive goals of the 1996 Act can be fully realized.

To that end, the Commission should revisit any tentative conclusion to the contrary and categorically reject the Bell companies' request for "targeted" interLATA relief for advanced services in certain remote areas. The Commission should also endorse its tentative conclusions regarding the presumptive feasibility of xDSL and also make clear that ILECs may not require CLECs to submit BFRs as a prerequisite to obtaining access to xDSL loops.

Respectfully submitted,

CABLEVISION LIGHTPATH, INC.



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CERTIFICATE OF SERVICE

I, Ellen Love, hereby certify that on this 25th day of September, 1998, I caused a copy of the foregoing "Comments of Cablevision Lightpath, Inc." to be sent by messenger (*) or by first class mail, postage prepaid to the following:

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